Supreme Court, U.S.
FILED
06-974 JAN 11 2007
OFFICE OF THE CLERK

No. (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 2006

YECHIEL ABRAMOV,
Petitioner,

--against--

NEDRA CHANDLER,
WARDEN OF DIXON CORRECTIONAL CENTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

VICTORIA B. EIGER
NATHAN Z. DERSHOWITZ *
DERSHOWITZ, EIGER
& ADELSON, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

* Counsel of Record

Attorneys for Petitioner
YECHIEL ABRAMOV

Alan M. Dershowitz
Of Counsel

QUESTION PRESENTED

Are a criminal defendant's rights to due process, to confront the witnesses against him, and to present a defense always subordinate to the attorney-client privilege of a cooperating prosecution witness, and if not, must the privilege yield if, among other things, the attorney-client communication appears to be an attempt by the cooperating witness to use an attorney to communicate with another cooperating witness to coordinate false testimony they would give at defendant's trial and the contents of the communication have already been made public.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

THIS COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT THE NON-CONSTITUTIONAL ATTORNEY CLIENT PRIVILEGE, LIKE OTHER RILES OF EVIDENCE, DOES NOT AUTOMATICALLY TRUMP A DEFENDANT'S CONSTITUTIONAL RIGHTS TO CONFRONT THE WITNESSES AGAINST HIM, TO PRESENT A DEFENSE, AND TO A FAIR TRIAL AND THAT IN A CASE LIKE THIS ONE THE PRIVILEGE, IF ANY, MUST YIELD TO THE CONSTITUTIONAL RIGHTS OF THE DEFENDANT ON TRIAL 8

CONCLUSION 16

APPENDIX

Amended Decision of the Appellate Court of Illinois, Second District, dated April 24, 2001 ..... App. 1

Order of the Illinois Supreme Court denying the petition for leave to appeal dated October 3, 2001 ..... App. 18

Memorandum Opinion and Order of the United States Court for the Northern District of Illinois denying the habeas relief dated May 17, 2006 ..... App. 19

Memorandum Opinion and Order of the United States Court for the Northern District of Illinois denying application for a certificate of appealability dated June 29, 2006 ..... App. 44

Order of the U.S. Court of Appeals for the Seventh Circuit denying a certificate of appealability dated October 27, 2006 ..... App. 53

TABLE OF AUTHORITIES

CASES

Ake v. Oklahoma,
470 U.S. 68 (1985) 11

Berger v. United States,
295 U.S. 78 (1935) 14

Branzburg v. Hayes,
408 U.S. 665 (1972) 11

Brooks v. Tennessee,
406 U.S. 605 (1972) 11

Carey v. Musladin,
__S. Ct. __ (2006) 12

Chambers v. Mississippi,
410 U.S. 284 (1973) 10, 12

Chavez v. Martinez,
538 U.S. 760 (2003) 11

Commonwealth v. Sims,
521 A.2d 391 (Pa. 1987) 14

Crane v. Kentucky,
476 U.S. 683 (1986) 10, 11

Crawford v. Washington,
541 U.S. 36 (2004) 9

Davis v. Alaska,
415 U.S. 308 (1974) 9, 12

Delaware v. Van Arsdall,
475 U.S. 673 (1986) 9

Green v. Georgia,
442 U.S. 95 (1979) 10, 12

Herbert v. Lando,
441 U.S. 153 (1979) 11

Holmes v. South Carolina,
126 S. Ct. 1727 (2006) 10

Marshall v. Lonberger,
459 U.S. 422 (1983) 10

Maryland v. Craig,
497 U.S. 836 (1990) 9

Mills v. Singletary,
161 F.3d 1273 (11th Cir. 1998),
cert. denied, 528 U.S. 1082 (2000) 13

Mooney v. Holohan,
294 U.S. 103 (1935) 14

Morris v. Ylst,
447 F.3d 735 (9th Cir. 2006),
petition for cert. filed 14

Murdoch v. Castro,
365 F.3d 699 (9th Cir. 2004) 12

Napue v. Illinois,
360 U.S. 264 (1959) 14

Neku v. United States,
620 A.2d 259 (D.C. App.),
cert. denied, 510 U.S. 1003 (1993) 13

Nix v. Whiteside,
475 U.S. 157 (1986) 12, 13

Northern Mariana Islands v. Bowie,
243 F.3d 1109 (9th Cir. 2001) 14

Olden v. Kentucky,
488 U.S. 227 (1988) 9

Portuondo v. Agard,
529 U.S. 61 (2000) 11

Spencer v. Texas,
385 U.S. 554 (1967) 10

State v. Cascone,
487 A.2d 186 (Conn. 1985) 13

Strickler v. Greene,
527 U.S. 263 (1999) 14

Swidler & Berlin v. United States,
524 U.S. 399 (1998) 12

Taylor v. Illinois,
484 U.S. 400 (1988) 9

United States v. Rainone,
32 F.3d 1203 (7th Cir. 1994),
cert. denied, 515 U.S. 1102 (1995) 13

United States v. Scheffer,
523 U.S. 303 (1998) 10

CONSTITUTION AND STATUTES

U.S. Const.,
Amend. VI 1
Amend. XIV 1

28 U.S.C.,
§ 1254(1) 1
§ 2254 7

OPINIONS BELOW

The amended decision of the Appellate Court of Illinois, Second District is dated April 24, 2001, and is reproduced at App. 1. The order of the Illinois Supreme Court denying the petition for leave to appeal is dated October 3, 2001 and is reproduced at App. 18.

The Memorandum Opinion and Order of the United States District Court of the Northern District of Illinois denying habeas relief is unreported, and is reproduced at App. 19. The order of the District Court denying a certificate of appealability is reproduced at App. 44. The order of the United States Court of Appeals for the Seventh Circuit denying a certificate of appealability is reproduced at App. 53.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit denying a certificate of appealability was entered on October 29, 2006. (App. 53) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law;...

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy- the right ...to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor, ...

STATEMENT OF THE CASE

Petitioner Yechiel Abramov ["Abramov"] has steadfastly maintained that he is entirely innocent of the crimes of which he stands convicted, which involved an invasion of his own home in Grayslake, Illinois and a vicious attack there upon his beloved wife. Abramov also contends – and has always contended – that his conviction (and the 35 years sentence he is serving) was obtained by the State of Illinois through the use of perjurious testimony of cooperators who had much to gain by implicating him in their own crimes. His legal claim is that he was deprived of the opportunity to effectively expose the witnesses' lies and lack of veracity because the state courts recognized as absolute an attorney-client privilege of one of the prosecution witnesses, first asserted by the State via a motion in limine. Petitioner contends that the privilege, if any, should have been weighed against and held subordinate to his Fourteenth and Sixth Amendment rights to a fair trial, to confront the witnesses against him, and to present a defense.

The following facts are not in dispute. In early April 1995, Leroy Solti, a young gang member, left his car for repairs at the service station where Petitioner was employed as a skilled mechanic. Solti lacked the funds to pay for the work that was needed. On April 12, 1995, while Abramov was at work, Solti and his even younger side kick, Lamar Jones, broke into the suburban home into which Abramov, his wife Angela, and the couple's young son had recently moved. When Solti and Jones came to the door, Angela telephoned her husband, who told her to call the police, but she did not. The two men got in, and a struggle ensued. Angela was shot and stabbed and jewelry was taken from her but she was able to call 911 after the attack and, thankfully, she recovered from her injuries. Solti and Jones were stuck at a railroad crossing during their attempt to flee the vicinity, and they were apprehended. Found with bloody gloves

and Angela's diamond ring in their possession, they were taken into custody. During police questioning, they claimed that Abramov, who was holding Solti's car pending payment for the repairs, had hired them to kill Angela. They maintained that Abramov promised to forgive the repair bill and give them cash in exchange for their doing so.

Solti and Jones were charged with home invasion and assault on Angela. Though he steadfastly denied any involvement in the crimes, Petitioner was charged with solicitation of murder for hire, attempted first degree murder, and aggravated battery with a firearm.

Solti and Jones made deals with the State. At trial, they repeated their contention that Abramov had solicited them to kill his wife, offering to forgive the repair bill if they did so. Nathan Weaver and Eric Bell, two men who knew Solti and Jones from the neighborhood and with whom Jones was able to communicate while held in jail, testified at the trial that Abramov had previously hired them to kill his wife.

Abramov, a hard working family man who had served in the Israeli Air Force for four years prior to his emigration to the United States, has always maintained and he testified that he never solicited anyone to kill Angela, to whom he was happily married, and that he was not responsible for Solti's and Jones' invasion of his home nor their attack on his wife. Abramov maintained that Solti and Jones broke into his house and attacked Angela on their own, for their own reasons and, when caught, falsely implicated Abramov in their own crimes to reduce the sentence they would receive. (Solti and Jones both pled guilty. Solti was sentenced to 25 years, reduced to 18 following his testimony against Abramov. Jones was sentenced to 18 years, reduced to 11 years for his testimony.) The other pair of men (Weaver and Bell) falsely corroborated the Solti/Jones solicitation story by claiming that they too had been solicited by Abramov in order to help Solti and Jones, who were their

friends, and to absolve themselves of criminal liability for having robbed Abramov and his wife in a city park six months before the April 12 attack.

Following Solti's guilty plea but prior to Petitioner's trial,[1] Solti arranged to meet with a criminal attorney, Robert Ritacca, in the Lake County jail. Based on his conversation with Solti and Solti's request that Ritacca deliver a letter from Solti to Jones, attorney Ritacca concluded that Solti intended to testify falsely against Abramov and was endeavoring to use Ritacca to co-ordinate his false story with Jones'. Accordingly, Ritacca informed Abramov's attorneys about what had occurred during his meeting with Solti.

Defense counsel advised the prosecution about what Ritacca had told them. Rather than acting to insure that false testimony was not presented by prosecution witnesses by, for example, requiring Solti to waive the attorney-client privilege, the State moved in limine to bar the defense from calling Ritacca to testify about his meeting with Solti or cross-examining Solti about it, asserting Solti's attorney-client privilege as the basis for the motion in limine.

An evidentiary hearing was held on the motion, at which Ritacca testified about his jailhouse meeting with Solti. According to Ritacca's sworn testimony, Solti told Ritacca about the situation which had put him in jail, stating that he could do or say anything the State asked him to do or say. Solti also told Ritacca that he and Abramov "had an argument" about the cost of repairs to Solti's car, his "only worldly possession."

---

[1] Petitioner was tried twice. His first trial, by jury, resulted in a guilty verdict but that conviction was reversed on appeal based on ineffective assistance of counsel. Petitioner then waived his right to trial by jury, and his second trial, which resulted in the conviction at issue here, was a bench trial.

According to Solti, Abramov asked him to rob his (Abramov's) house to pay the repair bill and get his car back. Solti told Ritacca that he knew where Abramov lived because he had followed him home one night. Solti also told Ritacca that, on the day Angela was attacked, he had gone to the house with Jones to commit the robbery, and saw someone else already there attacking the woman.

At their meeting, Solti asked Ritacca to deliver a letter to Jones, so that Solti could communicate with Jones as to what Solti had just told Ritacca. Ritacca declined to do so, having concluded that Solti had concocted his story and was attempting to use Ritacca as a "messenger boy" to enable him to coordinate what would be perjurious testimony with Jones. Ritacca told Solti that he would not do this. Solti never communicated with Ritacca after that.

Following the hearing, the trial court rejected the defense argument that the attorney-client privilege should not bar use of this information to cross-examine Solti, nor bar Ritacca from testifying at the trial about the conversation. Ruling that Ritacca's conversation with Solti was privileged, the trial court granted the State's motion in limine.

The trial court rejected the defense contention that the conversation fell within the crime-fraud exception, on the ground that the defense had failed to meet its burden of establishing that Solti intended to commit perjury. In the trial court's view, Ritacca – having refused to accept the letter that Solti wanted him to deliver – did not know what it said, and thus Ritacca's testimony could not prove that Solti had asked him to deliver the letter with the intent to facilitate a plan to commit perjury or fraud on the court.

Because of the court's in limine ruling, the defense was foreclosed from cross-examining Solti about his attempt to pass a letter to Jones. The defense was also foreclosed from cross-

examining Solti about statements that Solti had made to Ritacca that were inconsistent with Solti's (and Jones') trial testimony and which were exculpatory of Petitioner, including Solti's statement to Ritacca that he and Jones had once followed Abramov to his home in Grayslake. This was inconsistent with Solti's and Jones' trial testimony that, days before their attack on Angela, Abramov himself had driven Solti and Jones to Grayslake to show them where he lived, showing not only that Solti was lying about Petitioner's involvement but also that Solti and Jones were engaged in getting information about the Abramovs on their own, for their own purposes.

At the trial, Solti and Jones testified that Abramov had solicited them to kill his wife. Bell and Weaver testified that Petitioner had earlier solicited them to do the same thing. Abramov testified on his own belief, denying their charges.

The trial judge, sitting as the trier of fact, found Abramov guilty. Abramov was sentenced to 35 years in prison, a sentence he is currently serving.

On direct appeal to the Circuit Court of Illinois, Second Department, the appeals court upheld the in limine ruling, concluding that Abramov had failed to carry his burden of establishing the crime-fraud exception to the attorney client privilege. (App. 14-15) In support of that ruling, the appeals court cited Ritacca's testimony that he was unsure as to whether Solti had given a statement to the police, how Solti's trial testimony would differ from his previous statements, how long Solti's police report was, and whether Solti was represented by another attorney when Ritacca met with him. (App. 15) The appeals court also rejected Abramov's claim that there was no privilege because Solti's request to Ritacca that he deliver a letter to Jones demonstrated Solti's intent to disclose to a third person the same subject matter he had discussed with Ritacca. (App. 16) The appeals court ruled that this claim failed in light of the defense's failure to establish the content of the envelope

that Ritacca refused to accept. (App. 16-17)

That court also rejected out of hand the defense contention that, even if an attorney client privilege applied, it must yield to the defendant's superior Constitutional rights to confront his accusers and present a defense. The state appeals court ruled that "the right to confront one's accusers does not take precedence over the attorney client privilege. (App. 15) The appeals court held that the attorney-client privilege is absolute: "unlike some privileges ... the attorney client privilege does not give way to a defendant's right under the confrontation clause." (App. 15)

The Supreme Court of Illinois denied leave to appeal. (App. 18) Abramov was denied relief in subsequent state post-conviction proceedings. (See App. 22-23)

Abramov timely commenced a proceeding under 28 U.S.C. § 2254, asserting that his conviction violated his due process and Sixth Amendment rights. He contended that the law as established by this Supreme Court, recognized that a person charged with crimes has a constitutional rights to confront the witnesses against him and to present a defense, rights that evidentiary rules – including evidentiary privileges – cannot stymie.

The district court rejected the claim because there was no Supreme Court case law directly on point. App. 27-33 In denying Abramov's request for a certificate of appealability, the district court reiterated that ruling. (App. 50; "The Court did not find any Supreme Court case law directly on point with Abramov's claim.") The Seventh Circuit denied Petitioner's request for a certificate of appealability, stating that the case raised no substantial issue. (App. 53)

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT THE NON-CONSTITUTIONAL ATTORNEY CLIENT PRIVILEGE, LIKE OTHER RULES OF EVIDENCE, DOES NOT AUTOMATICALLY TRUMP A DEFENDANT'S CONSTITUTIONAL RIGHTS TO CONFRONT THE WITNESSES AGAINST HIM, TO PRESENT A DEFENSE, AND TO A FAIR TRIAL AND THAT IN A CASE LIKE THIS ONE THE PRIVILEGE, IF ANY, MUST YIELD TO THE CONSTITUTIONAL RIGHTS OF THE DEFENDANT ON TRIAL

This case lies at the very heart of the Court's habeas jurisdiction, and presents an important constitutional claim. Petitioner, who otherwise has an unblemished record, has always maintained his complete innocence of the horrific crimes for which he stands convicted. He contends that his constitutional rights to a fair trial and to confront his accusers were violated when the Illinois State courts ruled that the non-constitutional attorney client privilege of a cooperating prosecution witness was absolute, even where the contents of the conversation, even if privileged, had already been fully disclosed. The state courts did so without consideration of whether recognition of the privilege would interfere with the defendant's right to confront his accusers, to a fair trial, and, ultimately, to a reliable determination of guilt or innocence.

The federal district court refused to grant habeas relief on the ground that the principle of law upon which the Petitioner relies – that the attorney-client privilege cannot automatically trump a defendant's constitutional rights – is not established by any decision of this Court. The Court of Appeals ruled the case presents "no substantial issue."

Those courts were wrong. The legal principle upon which Petitioner relies is well established by this Court's jurisprudence, and Petitioner is therefore entitled to relief. At the very least, the question is one of substantial importance, deserving of this Court's attention.

The Confrontation Clause of the Sixth Amendment guarantees an accused the right to confront and cross-examine the witnesses against him. Davis v. Alaska, 415 U.S. 308, 319 (1974) (holding that State's policy of keeping juvenile records confidential "is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness").

The purpose of the Clause is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845 (1990). The right to confront accusers is a "bedrock procedural guarantee." Crawford v. Washington, 541 U.S. 36, 42 (2004). The twin rights of an accused "to confront the prosecution's witnesses for the purpose of challenging their testimony... and to present his own witnesses to establish a defense" are "fundamental element[s] of due process of law." Taylor v. Illinois, 484 U.S. 400, 409 (1988). The right to effective cross-examination is violated when an accused is prohibited from "engaging in otherwise appropriate cross-examination designed to show a prototypical form" of impeachment. Olden v. Kentucky, 488 U.S. 227, 231 (1988).

To be sure, trial judges retain discretion to impose reasonable limits on the scope and extent of cross-examination. Delaware v. Van Arsdall, 475 U.S. 673 (1986). But, a trial judge cannot constitutionally limit an accused's attempt to cross-examine a witness on an essential area of witnesses credibility absent a paramount state interest in restricting such cross-examination.

Additionally, and closely related, the decisions of this Court recognize that persons charged with crimes have a Constitutional right to present a defense, a right that evidentiary rules – including evidentiary privileges – cannot stymie. See Chambers v. Mississippi, 410 U.S. 284 (1973); Green v. Georgia, 442 U.S. 95 (1979).

These well-established rights were recently reconfirmed by this unanimous Court in Holmes v. South Carolina, 126 S. Ct. 1727 (2006). Breaking no new ground, the Holmes set forth the pertinent principles as follows:

> [S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. United States v. Scheffer, 523 U.S. 303, 308 (1998); see also Crane v. Kentucky, 476 U.S. 683, 689-90 (1986); Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973); Spencer v. Texas, 385 U.S. 554, 564 (1967). This latitude, however, has limits. "Whether rooted directly in the Due Process Clause of the fourteenth Amendment or in the Compulsory Process or confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Crane, supra, at 690 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984); citations omitted). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve'. Scheffer, supra, at 308, (quoting Rock v. Arkansas, 483 U.S. 44, 58, 56 (1987).

126 S. Ct. at 1731. This Court's precedents have also long recognized a due process right to present exculpatory evidence, Crane v. Kentucky, 476 U.S. 683 (1986), and to rebut evidence offered by the prosecution. See Ake v. Oklahoma, 470 U.S. 68 (1985).

This Court has squarely held that the possibility that a witness's testimony may have been tailored or influenced by others is a proper subject of credibility which may be brought to the jury's attention, even if the witness is the defendant. Portuondo v. Agard, 529 U.S. 61 (2000). Testimonial tailoring by any witness during a trial threatens the integrity of the trial. The antidote to this threat, as Brooks v. Tennessee, 406 U.S. 605 (1972), recognizes, is to let the fact finder know of its existence. Portuondo, 529 U.S. at 70.

These fundamental principles apply, even where evidentiary privileges may be involved. "Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." Herbert v. Lando, 441 U.S. 153, 175 (1979) (emphasis added). "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth." Id., quoting United States v. Nixon, 418 U.S. 683, 710 (1974). See also Branzburg v. Hayes, 408 U.S. 665 (1972) (refusing to grant journalists a First Amendment privilege to withhold grand jury testimony regarding information received in confidence).

Thus, like other evidentiary privileges, the attorney-client privilege is not absolute. It is a non-constitutional privilege. To the extent that, in some circumstances, the privilege is related to a defendant's Constitutional right to counsel – which is a trial right – the right to counsel is not implicated in Petitioner's case. Solti was not a defendant on trial, whose attorney-client privilege protected his constitutional right to counsel. Cf. Chavez v. Martinez, 538 U.S. 760 (2003) (Fifth Amendment

right against self-incrimination is a trial right; that right is not violated unless the defendant's compelled statements are used against him in a criminal case) (per Justice Thomas, with the Chief Justice and two Justices joining, and two Justices concurring in the judgment). Petitioner Abramov, on the other hand, was on trial, and he was entitled to the constellation of Constitutional protections which insure, to the extent possible, the integrity and accuracy of the truth determining process.

That this Court has not, apparently, decided a case in which its decision has subordinated the attorney-client privilege of a prosecution witness to the due process or confrontation rights of a criminal defendant does not mean that Petitioner cannot be afforded relief on federal habeas. The state courts' determination that the attorney-client privilege is always superior to a defendant's due process or confrontation rights is both contrary to and an unreasonable application of clearly established federal law, as determined by this Court. See Carey v. Musladin, ___ S. Ct. ___ (2006). As the Court has said, a criminal defendant's Constitutional rights could warrant breaching the attorney client privilege. See Swidler & Berlin v. United States, 524 U.S. 399, 409, n.3 (1998). Moreover, this Court has recognized that the privilege does not extend to a client's announced plans to engage in future criminal conduct." Nix v. Whiteside, 475 U.S. 157, 174 (1986). See also Davis v. Alaska, supra; Chambers v. Mississippi; supra; Green v. Georgia, supra.

Based on this Court's precedents, several federal Courts of Appeals have held that the attorney client privilege is not absolute, the Ninth Circuit in the context of a defendant seeking habeas corpus relief. In Murdoch v. Castro, 365 F.3d 699 (9th Cir. 2004), the Court ruled that the attorney client privilege must yield to the Constitutional right of confrontation. Murdoch further held that, while the contours of the privilege are generally a matter of state law, the privilege does not extend to perpetrating a fraud against the court, citing Nix v. Whiteside, 475 U.S. 157, 167-68 (1986). And, noting due process concerns,

the Ninth Circuit has gone further, suggesting that a prosecutor faced with the possibility of questionable testimony would be well advised to pursue waiver of the privilege by a cooperating witness, citing the Brady line of due process cases in that regard.

The Ninth Circuit does not stand alone in its understanding of this Court's rulings. See United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994), cert. denied, 515 U.S. 1102 (1995) ("Even the attorney-client privilege ... hallowed as it is, yet not found in the Constitution, might have to yield in a particular case if the right of confrontation ... would be violated by enforcing the privilege). Citing this Court's cases, Rainone recognized that "[e]ven privileges recognized when the Constitution was written can be trumped by constitutional rights, such as the right of confrontation conferred by the Sixth Amendment and interpreted to include the right of cross-examination." 32 F.3d at 1206. See also Mills v. Singletary, 161 F.3d 1273 (11th Cir. 1998), cert. denied, 528 U.S. 1082 (2000). State v. Cascone, 487 A.2d 186, 190 (Conn. 1985) (finding error; when the State asserts the privilege by moving in limine, the privilege is transformed from a shield into a sword."); Neku v. United States, 620 A.2d 259 (D.C. App.), cert. denied, 510 U.S. 1003 (1993).

There is no reason the law could or should be otherwise. Unique dangers are posed to a fair trial – and substantial risks of convicting innocent persons exist – where (as here) the State relies upon cooperators. A cooperating witness has a powerful motive to fabricate to secure the best deal possible from the prosecution. See generally Stephen S. Trott, "Words of Warning for Prosecutors Using Criminals as Witnesses," 47 Hastings L.J. 1381, 1282 (1996); Ellen Yaroshefsky, "Cooperating with Federal Prosecutors: Experiences with Truth Telling and Embellishment," 68 Fordham L. Rev. 917, 932 (1999). Accordingly, prosecutors have an obligation not only to take steps to insure that its cooperating witnesses are not lying and recruiting others to support their lies, but to fully investigate

evidence that its witnesses are committing perjury or scheming to obstruct justice. See B. Tarlow, "The Highwayman Visits the Marianas: Informers Beware," The Champion, May 2006, at 58-63, discussing Northern Mariana Islands v. Bowie, 243 F.3d 1109 (9th Cir. 2001). See also Morris v. Ylst, 447 F.3d 735 (9th Cir. 2006), petition for cert. filed ("When a prosecutor suspects perjury, the prosecutor must at least investigate," citing Napue v. Illinois, 360 U.S. 264 (1959), and Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam), the latter holding that a conviction obtained through "deliberate deception of court and jury...is...inconsistent with the rudimentary demands of justice.").

A fortiori, prosecutors cannot be permitted to take affirmative steps – including, as here, raising, pre-trial, an attorney-client privilege on behalf of a witness – to block pertinent cross-examination that may expose the fact that its witnesses attempted to tailor their testimony. Cf. Strickler v. Greene, 527 U.S. 263, 281 (1999) (a prosecutor plays a "special role" in the search for the truth in criminal cases); Berger v. United States, 295 U.S. 78, 88 (1935) (the sovereign's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done."). Rather than moving in limine to bar the defense examination, the prosecutors should have pressed its witnesses to waive the privilege as part of the plea bargain.[2]

---

[2] At the least, the defense should have been permitted to compel Solti to invoke the attorney - client privilege in the presence of the factfinder so the factfinder could take that invocation into account in evaluating credibility. See Commonwealth v. Sims, 521 A.2d 391, 395-96 (Pa. 1987) (trial judge's refusal to require key witness to invoke attorney-client privilege in the presence of the jury was an unacceptable infringement upon defendant's right of Confrontation).

A stronger case than this one for application of the principle that the attorney-client privilege must in some circumstances yield to a defendant's right to cross-examine his accusers is hard to imagine. No paramount state interest was furthered in this case by recognition of Solti's privilege as a bar to cross-examining him about his prior inconsistent statements and his attempts to use an intermediary to pass a message to his partner in crime. The complete contents of the communication between Solti and Ritacca had already been disclosed to the defendant, his attorneys, the prosecutors, the court, and to the entire public in connection with the hearing that the trial court held on the State's motion in limine.

On the other hand, the information that was excluded, and the cross-examination that was foreclosed, was extremely significant to the defense. It prevented the Petitioner from showing that the State's witnesses had schemed to coordinate their stories. It also prevented Petitioner from showing that Solti had an alternative means for having acquired, for example, information about the location of the Abramovs Grayslake home, exposing as false Solti's claim that Abramov had purposefully shown him and Jones the route to enable them to kill his wife. Solti's statement to Ritacca in which he claimed that Abramov asked them to commit a robbery (not a murder) would itself have been powerful proof that this was a robbery, not an incomplete murder for hire. Further, the very fact that Solti was trying to use an attorney to communicate with Jones was itself significant. If Abramov had hired Solti and Jones to kill his wife, there would have been no need for them to coordinate their stories.

In this prosecution, instead of functioning as a true protection of real attorney-client communication, the privilege operated to reward Solti's cynical manipulation of the legal system (with which he was very familiar) by using a lawyer to protect his message. Solti obtained the intended protective effect: because Ritacca refused to violate his own professional obligation not to accept and pass on Solti's letter, Abramov was

deprived of its use. Yet Solti's brief contact with attorney Ritacca was deemed sufficient to shield Solti from cross-examination as to his own highly inculpatory statements relating to it. Ultimately, the State benefitted unfairly too, obtaining a conviction, but one which appears to be of an innocent man.

Thus, the state courts' acceptance of Solti's attorney-client privilege subverted the trial's truth-seeking function, while serving no important countervailing societal interest. It allowed the State to present what was almost certainly false testimony without fear of impeachment or contradiction. It unfairly enhanced the State's chances of obtaining a conviction, at the expense of the defendant, his liberty, and the truth.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully,

VICTORIA B. EIGER
NATHAN Z. DERSHOWITZ*
DERSHOWITZ, EIGER &
ADELSON, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

Alan M. Dershowitz
Of Counsel

Attorneys for Petitioner
Yechiel Abramov

COUNSEL OF RECORD*

Dated: January 9, 2007

APPENDIX

No. 2--99--0424

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit) Court of Lake County.
Plaintiff-Appellee,	)
v.	) No. 95 --CF--1214
YECHIEL ABRAMOV,	) Honorable) George Bridges,
Defendant-Appellant.	) Judge, Presiding.

MODIFIED ORDER UPON DENIAL OF REHEARING
RULE 23 ORDER

Following a bench trial in the circuit court of Lake County, defendant, Yechiel Abramov, was convicted of one count each of solicitation of murder for hire (720 ILCS 5/8--1.2 (West 1994)), attempted first degree murder, (720 ILCS 5/8--3 (West 1994)), and aggravated battery with a firearm (720 ILCS 5/12--4.2 (West 1994)). Defendant raises four issues on appeal. First, defendant contends he was not proven guilty beyond a reasonable doubt. Second, defendant argues venue was improper regarding one count of the indictment. Third, defendant asserts that the trial court erred in failing to remedy certain discovery violations committed by the State. Fourth, defendant argues that the trial court erred in barring the statement of a witness on the basis of the attorney-client privilege.

Before turning to the merits of this case, we admonish the appellant regarding his failure to comply with the applicable Supreme Court Rules regarding citations. See 145 Ill. 2d R. 6; 177 Ill. 2d R. 341(d). Defendant's citations to cases only rarely provide a reference to the pages upon which the matter relied on appears. While the State generally provides pinpoint citations, we disapprove of its practice of relying upon a computer database for case law and not providing a citation to the portion of the case relied upon when the database has not yet made page number available. Supreme Court Rule 6 requires citations to the official reporter. 145 Ill. 2d R. 6. For several cases, where the State asserts that their database did not yet contain the relevant page citations, the official version of the reporter containing the case had been published prior to the filing of their brief.

I. BACKGROUND

On April 12, 1995, Lamar Jones and Leroy Solti, broke into defendant's home, which was located at 212 Killarney Road in Grayslake. Defendant and his family had moved into this house approximately five weeks earlier. Defendant's wife, Angela, and his son were present. Defendant was at work. Jones and Solti stabbed and shot Angela. They were apprehended shortly thereafter, and told police that defendant had hired them to kill his wife, Angela. Solti testified that he first became acquainted with defendant when he brought his car in for repairs at the automotive shop where defendant worked. After receiving an estimate, Solti told defendant he did not have enough to pay for the repairs. Defendant told Solti not to worry because he had a job for him. Subsequently, defendant requested that he kill Angela.

Two other witnesses, Nathan Weaver and Eric Bell, testified that defendant had previously attempted to hire them to kill Angela. At the time, defendant and his family were living on Cicero Avenue in Chicago. Although neither Weaver nor Bel

intended to kill her, they led defendant to believe that they did because defendant was giving them money. At one point, Weaver and Bell staged a robbery, with defendant's cooperation, where they were to kill Angela and take money from defendant. They only did the latter. Extensive testimony was presented in the trial below, and it will not be recited at this point. Additional facts will be discussed as they pertain to the issues raised by the parties.

II. PROOF OF GUILT BEYOND A REASONABLE DOUBT

Defendant contends that the State failed to prove him guilty beyond a reasonable doubt because the four main witnesses upon which the State's case rested were thoroughly impeached, biased, and their testimony was rife with inconsistencies. In assessing such a challenge, all of the evidence must be viewed in the light most favorable to the prosecution. People v. Manning, 182 Ill. 2d 193, 210 (1998). The proper inquiry is whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. People v. Smith, 185 Ill. 2d 532, 541 (1999). A conviction will be upheld unless the evidence is so unsatisfactory as to create a reasonable doubt about the defendant's guilt. People v. Eyler, 133 Ill. 2d 173, 191 (1989). This standard is applicable in bench trials. People v. Feld, 267 Ill. App. 3d 56, 61 (1994). It is the role of the trier of fact to assess the credibility of witnesses, determine weight given the evidence, and draw reasonable inferences therefrom. People v. Wiley, 165 Ill. 2d 259, 297 (1995). We will not substitute our judgment for that of the fact finder on questions involving credibility of witnesses or weight of evidence. People v. Young, 128 Ill. 2d 1, 51 (1989).

Defendant asserts that the testimony of Jones, Solti, Weaver, and Bell is not worthy of belief. Defendant first notes that each was a convicted felon and admitted gangmember. Furthermore, Solti and Jones testified as part of a plea agreement, while Weaver and Bell were never prosecuted for the

staged robbery of defendant and his wife. The trial court was, however, presented with this potentially impeaching information, and it was the trial court's role to weigh this evidence and determine defendant's guilt or innocence. People v. Brisbon, 106 Ill. 2d 342, 361 (1985). We will not substitute our judgment for that of the trial court, which had the opportunity to observe these witnesses' testimony first hand. See People v. Calusinski, 314 Ill. App. 3d 955, 961 (2000).

Defendant next points to a number of inconsistencies in the testimony of the State's witnesses. Bell testified that defendant gave him a matchbook with the address to his Grayslake home on it. Jacqueline Campbell, Bell's girlfriend testified that she threw the matchbook away; however, her testimony also indicated that she saw the matchbook approximately 5 months before defendant moved to Grayslake. It is conceivable that Campbell was mistaken as to the date. Weaver testified that after defendant moved, he showed Weaver where he lived in Grayslake. Thus, defendant could have given Weaver the matchbook at a later time. In any event, it was for the trier of fact to resolve conflicts in the evidence. People v. Kelchner, 221 Ill. App. 3d 25, 30 (1991). Furthermore, Campbell also testified that defendant came to her apartment looking for Bell. She did not identify defendant during the trial because of her poor eyesight and the distance defendant was sitting from the witness stand, however, Campbell did identify defendant in an earlier photographic lineup.

Weaver claimed he was introduced to defendant by Jeffrey Steele, a co-worker of defendant. Steele denied making this introduction. Defendant asserts that Weaver had no reason to lie about this. For the purposes of review, we reemphasize that we must view the record in the light most favorable to the prosecution. Manning, 182 Ill. 2d at 210. Steele was a co-worker of defendant, and it is possible that Steele was concerned about implicating himself in the criminal activity that followed the introduction. We cannot say that Steele's testimony was so

credible that the trial court was required to accept it.

Defendant next argues that Jones testified that he attempted to procure .32 caliber bullets during the afternoon of April 11, 1995, for a gun that defendant did not give to Solti until the evening of that day. However, at this point, Jones testified that he did not remember the time that he tried to procure these bullets. Later, the following exchange took place between Jones and defense counsel:

"Q I'm going to ask you when it was that you asked for the bullets from Nate Weaver?

A I don't remember the exact date it was.

Q What time of day was it?

A Noon.

Q At noon?

A Nighttime."

Thereafter, defense counsel asked whether Jones had previously testified that he had attempted to procure the bullets in the afternoon, and Jones stated that he had. Jones' testimony is an equivocal indication of a contradiction at best. From the record, it appears Jones did not recall when he tried to get the bullets. Again, it was the role of the trial court to resolve such conflicts in the evidence. Kelchner, 221 Ill. App. 3d at 30. We cannot say that this possible inconsistency so undermined Solti's and Jones' testimony that the trial court was not entitled to accept it.

Defendant points to other inconsistencies. For example, Bell told the police that defendant drove a blue car during their meetings, while stating at trial that the car was red. He also

testified that he only saw Angela on one occasion, but told the police that defendant had pointed her out a few times. Bell stated to the police that the killing was to take place in an apartment on Touhy Avenue, but defendant lived on Cicero Avenue at the time. However, at trial he emphasized that the apartment was on Cicero. He testified that defendant had not told him what Angela looked like, but he told police investigators that defendant described her as having short blond hair. Angela's hair has never been blond. Jones testified that he was unaware of defendant approaching anyone else to kill Angela; however, before the Grand Jury, he testified that he was aware that defendant had approached Weaver and Bell. Defendant goes on to point out several other inconsistencies in the testimony and statements of Bell and Jones.

These inconsistencies undoubtedly exist; however, defendant's argument ignores other evidence which corroborates the testimony of these four witnesses. Weaver, Bell, Solti, and Jones were aware of various details of defendant's life which would have been difficult, if not impossible, for them to learn from any source other than defendant. First, Weaver testified that defendant told him Angela always wore a pair of diamond earrings. Angela confirmed this fact during her testimony. Second, both Weaver and Bell testified that defendant instructed them to follow Angela and her mother to a mall and kill her there. Defendant told them that she drove a gray car at that time. Both testified that they would regularly go to a mall together when Angela's mother came over on one of her regular afternoon visits. Third, Campbell described defendant's work uniform and picked him out of a photographic lineup, despite defendant's assertion that he never met her. Fourth, Bell knew defendant's apartment on Cicero was on the third floor. Fifth, both Weaver and Bell accurately described defendant's work uniform. Sixth, Weaver and Bell both knew that Angela normally awoke at about 10 a.m. Seventh, Bell testified that defendant instructed them that they should not attempt to kill Angela on a Saturday, but any other day was fine. Saturday was the only day defendant did not

work. Eighth, Waver and Bell testified that prior to the staged robbery where they were to kill Angela, defendant showed them that he was carrying a large sum of money. During the staged robbery, after defendant produced some money, Weaver demanded more, indicating he knew defendant was carrying more money than he initially produced. Furthermore, Angela testified that it was not customary for defendant to carry a lot of money, however, on that occasion, he took a lot of money from the apartment with him. Ninth, Bell and Weaver both knew defendant's new home in Grayslake was near the railroad tracks. Bell's testimony that this house was the second one on the left from a stop sign was confirmed by Angela. Tenth, Bell was able to accurately describe the location of both telephones in this house. Eleventh, Jones and Solti testified that defendant told them that an older man might be present when they went to kill Angela. Angela's father regularly visited her. That they knew this despite the fact that he was not present at the time they made the attempt indicates that defendant must have told them of the father's possible presence. Twelfth, Solti testified that defendant showed him a little over $1,000 in cash the night before the attack. Defendant testified that he closed a bank account and withdrew about $1,200 the day before the attack and paid the money to an attorney the evening of the day of the attack. Defendant offers no plausible explanation of how these witnesses could have learned these facts from a source other than defendant.

Furthermore, Solti, Jones, Weaver, and Bell all testified consistently that defendant instructed them to not hurt his son. Solti and Jones testified they were to put the child in another room, and Solti added they were to lock the door to the room. Angela testified that one of her attackers immediately took the child to another room and that after the attack, she had to break down the door to the room where the child was because it was locked.

In finding defendant guilty, the trial court, in addition to the knowledge Solti and Jones possessed which could only have come from defendant, relied on the nature of the events which took place during the attack on Angela. The trial court noted that the attack appeared to be an execution rather than a robbery. This finding comports with the evidence presented in this case. At the time Solti and Jones entered the house, they were aware that Angela was home because Solti had previously knocked on the door and been denied access. They drove all the way from Evanston to Grayslake to get to defendant's house, which was located in a subdivision that was transversed by curving roads. That they made this trip indicates that they were not interested in burglarizing any house, rather, they were targeting the house where Angela resided. Defendant's house was sparsely furnished, so upon looking in through the patio door before breaking in, Solti and Jones would not have seen much to steal. Finally, Solti and Jones left two items of jewelry lying on the floor where the attack occurred.

Substantial evidence existed that supported the trial court's judgment regarding defendant's guilt. Conflicts in the evidence did exist, and the State's primary witnesses were felons and gangmembers. However, it was the trial court's function to resolve these conflicts and assess the credibility of these witnesses. Wiley, 165 Ill. 2d at 297. Given the substantial evidence indicating guilt, we cannot conclude that defendant was not proven guilty beyond a reasonable doubt.

In a related argument, defendant contends that the trial court improperly shifted the burden of proof to defendant to prove his innocence. Defendant relies on the following statement made by the trial court in the course of pronouncing defendant guilty: "[t]he question essentially is, was there a plan, as the defendant has argued, to make Mr. Abramov a victim." Defendant argues that the trial court based its finding of guilt on defendant's failure to prove his theory of the case. It is, of course, axiomatic that the State bears the burden of proving a

criminal defendant guilty. People v. Zarate, 264 Ill. App. 3d 667, 673 (1994).

The State's only response to this argument is that it is waived because defendant has failed to provide a citation to the record for the trial court's statement relied on by defendant in violation of Supreme Court Rule 341(e)(7). 177 Ill. 2d R. 341(e)(7). Rule 341 is not, however, a limitation upon this court's jurisdiction; it is an admonishment to the parties. Taake v. WHGK, Inc., 228 Ill. App. 3d 692, 714 (1992). While a party may be bound by such a waiver, this court, having the responsibility of reaching a just decision, is not. Majcher v. Laurel Motors, Inc., 287 Ill. App. 3d 719, 731 (1997). Where a brief is sufficient to allow review on the merits, we may elect to do so. Taake, 228 Ill. App. 3d at 714. The court's statement, relied on by defendant in support of his current argument and quoted in the preceding paragraph, appeared in the trial court's relatively short finding of guilt. Our review of this issue was not substantially impaired by this minor omission of a citation to the record. Accordingly, we will proceed to the merits of this argument.

Reading the trial court's opinion as a whole, it is clear that the burden was not shifted to defendant to prove his innocence. The trial court specifically noted that Jones' and Solti's actions during the attack were consistent with an execution. The court also expressly relied on Solti's knowledge of various facts which he could only have learned from defendant. The trial court explicitly stated "Why did Jones and Solti try to kill the [defendant's] wife? I find that it was because Mr. Abramov asked them to do it." This statement is an affirmative finding that the State met its burden of proof, rather than a statement that defendant failed to prove his theory of the case.

Presumably, by presenting an alternative theory of the case, defendant wanted the court to consider it. It was not

improper for the court to do so. Cf. People v. Makiel, 263 Ill. App. 3d 54, 74 (1994) (holding the State, by attempting to discredit defendant's theory of the case, did not impermissibly shift the burden of proof to the defendant). Moreover, defendant's reliance on one statement made in the course of a decision where the trial court considered the totality of the evidence is unpersuasive. See People v. Johnson, 260 Ill. App. 3d 558, 565 (1994).

III. VENUE

Defendant next argues that the State failed to prove venue regarding one count of the indictment. This count, count 7, alleged defendant solicited Weaver to kill Angela. See 720 ILCS 5/8--1.2 (West 1994). The Criminal Code of 1961 (Code) states that "[a] person commits solicitation of murder for hire when, with the intent that the offense of first degree murder be committed, he procures another to commit that offense pursuant to any contract, agreement, understanding, command or request for money or anything of value." 720 ILSC 5/8--1.2 (West 1994).

Venue is a material allegation which the State bears the burden of proving beyond a reasonable doubt. People v. Hagan, 145 Ill. 2d 287, 300 (1991).[1] In order to satisfy this burden, the State must prove that the county where the crime is alleged to have been committed is the county where the crime did occur. People v. Adams, 161 Ill. App. 3d 333, 341 (1994). Venue is proper in each county where an element of an offense is committed. People v. Eggerman, 292 Ill. App. 3d 644, 650

---

[1] At the time of the offense at issue in the present case, the venue statute had not yet been amended to eliminate the State's burden to prove venue. This amendment does not apply retroactively. See People v. Digirolamo, 179 Ill. 2d 24, 50 (1997).

(1997). Furthermore, section 1--6 of the Code provides that "[a] person who commits an inchoate offense may be tried in any county in which any act which is an element of the offense * * * is committed." 720 ILCS 5/1--6(m) (West 1994).

In the present case, Weaver testified that defendant drove him to Grayslake in order to show the house where Angela was now living. In the course of this testimony, Weaver described details about the houses location, such as that it was located near railroad tracks. Based on this testimony, the trial court could conclude that defendant did, in fact, bring Weaver to the Grayslake house. The purpose of this trip was to provide Weaver with the location of the house--knowledge he would need if he were going to kill Angela. It is immaterial that Weaver did not actually intend to kill her, as solicitation of murder for hire does not require an actual agreement between the parties. People v. Breton. 237 Ill. App. 3d 355, 362 (1992). It is sufficient that defendant's act was done a part of his scheme to procure Weaver to commit first degree murder. This act was sufficient to establish venue.

IV. DISCOVERY VIOLATIONS

Next, defendant argues that the trial court abused its discretion by failing to sanction the State for failing to preserve tapes upon which defendant's initial series of calls to the Grayslake police department were recorded. These tapes involved conversations between defendant, June Kuhfuss and Susan Bobka, two employees of the Grayslake Police Department. Both employees testified at trial regarding defendant's demeanor. Bobka added that defendant asked if his wife was dead despite the fact that she only told defendant to come to the station because there was a problem at his house. She also stated that defendant did not ask about his son. Both testified to defendant's apparent slow response to coming to the police station following these calls. Defendant contends that the loss of the tapes memorializing these conversations severely

hampered his ability to cross examine these witnesses.

In a pretrial hearing, Detective Douglass Hess, of the Grayslake Police Department, testified that a search for these missing tapes began approximately two weeks after the arrest of Jones and Solti. These arrests occurred on April 12, 1995. Bobka also testified that she assisted Hess in a search for the lost tapes. The earliest indication of any discovery order being entered in this case appears in the record of proceedings of defendant's arraignment on June 16, 1995, where the trial court stated "[t]he usual and customary orders of discovery will be entered." Thus, at the time the tapes were lost or destroyed, no discovery order or discovery motion by defendant existed.

Generally, the State is under no duty to preserve all material that is of conceivable evidentiary value to a particular prosecution. People v. Newberry, 166 Ill. 2d 310, 315 (1995) (quoting Arizona v. Youngblood, 488 U.S. 51, 58, 102 L. Ed. 2d 281, 289, 109 S. Ct. 333, 337 (1988)). However, where evidence possesses a readily apparent exculpatory value, it must be preserved. People v. Sleboda, 166 Ill. App. 3d 42, 53 (1988). Additionally, if the State destroys potentially useful evidence in bad faith, a due process violation occurs. Newberry, 166 Ill. 2d at 315. Neither the bad faith of the State nor the exculpatory value of the evidence need be shown where evidence is lost or destroyed after defendant has requested its production. People v. Koutsakis, 255 Ill. App. 3d 306, 311-12 (1994).

Because the tapes were lost or destroyed prior to any request for their production, defendant was required to show either that they possessed exculpatory value or that the State destroyed them in bad faith. Defendant failed to make either showing. Regarding the exculpatory value of the tapes, defendant points us to no evidence which would indicate that Kuhfuss's and Bobka's testimony regarding the recorded conversations was inaccurate. As defendant recognizes, the testimony of these two witnesses was damaging. Thus, the only

evidence before this court is that the tapes would have recorded a conversation that was damaging to defendant. Defendant's contention that the tapes contained material which could have rebutted Kuhfuss's and Bobka's testimony is pure speculation. Similarly, defendant points to nothing which indicates the State acted in bad faith in losing the tapes. It is unclear how the tapes were lost or destroyed. What is clear is that, once their loss was discovered, the State conducted an extensive search to try to find them.

Because defendant failed to show either that the State acted in bad faith or that the tapes were exculpatory, no discovery violation occurred. As such, the trial court did not abuse its discretion in denying defendant's motions for sanctions based on the loss of the tapes.

V. ATTORNEY/CLIENT PRIVILEGE

Defendant finally argues that the trial court erred in granting the State's motion in limine to exclude testimony from an attorney that Solti contacted prior to the first trial. On September 3, 1995, Robert Ritacca, an attorney, went to the Lake County jail at Solti's request. Solti wanted Ritacca to look into the circumstances surrounding his guilty plea regarding the attack on Angela and see if a better plea could be negotiated. Solti related to Ritacca a version of events regarding the attack that substantially differed from that to which he testified at trial. Ritacca testified that, during this visit, Solti asked him to deliver a letter to Lamar Jones. Ritacca declined to do so, and the visit terminated without Ritacca being retained by Solti. Ritacca subsequently communicated these events to defendant's first attorney, as well as his current attorney.

The State filed a motion in limine seeking to bar defendant from cross examining Solti regarding his conversation with Ritacca because it was protected by the attorney-client privilege. Finding the State fulfilled its burden of showing the

privilege had attached, the trial court granted the motion. In the course of making this ruling, the trial court found that defendant had not established that the crime-fraud exception vitiated the privilege. Defendant now raises seven arguments attacking the trial court's ruling. At this point, defendant's brief breaks down into a series of conclusory arguments of a sentence or two in length, followed by strings of citations, most of which do not identify the portion of the cases upon which defendant is relying. Contentions must be supported by argument (See People v. Hood, 210 Ill. App. 3d 713, 746 (1991) (minimal argument regarding point raised would justify waiver), and arguments must be supported by citations to the pages upon which a party relies (145 Ill. 2d R. 6; 177 Ill. 2d R. 341(d)). Accordingly, these arguments are waived. Furthermore, even if we were not to consider them waived, defendant's arguments would fail on the merits.

Defendant first contends that the State was not entitled to raise the privilege. According to defendant, the privilege was a personal right to Solti, which could not be vicariously exercised by a third party for that party's benefit. People v. Ryan, 30 Ill. 2d 456, 461 (1964). While we accept this principle of law, it is also fundamental that a party may not call a witness merely to cause the witness to invoke a privilege. See People v. Vera, 277 Ill. App. 3d 130, 137 (1995); People v. Everett, 228 Ill. App. 3d 1054, 1060 (1992). In the present case, the State's representation that Solti had indicated he would not waive the privilege was uncontested. In such circumstances, a trial court may bar a witness from testifying. People v. Cvetich, 73 Ill. App. 3d 580, 584-85 (1979).

Defendant also contends that the crime-fraud exception (see In re Marriage of Granger, 197 Ill. App. 3d 363, 375 (1990)) applies in this case and renders the conversation between Solti and Ritacca unprivileged. According to defendant, Solti was seeking Ritacca's services in order to seek a better plea agreement by perjuring himself. The party asserting this

exception bears the burden of proving its applicability. In re Marriage of Decker, 153 Ill. 2d 298, 321 (1992). The trial court concluded that defendant had not met this burden. Prior to ruling the exception did not apply, the court heard testimony from Ritacca, which it described as "all over the page." For example, Ritacca testified that he was unsure at to whether Solti had given a statement to the police, how Solti's testimony would differ, whether Solti was represented at the time, and how large Solti's police report was. Given the quality of Ritacca's testimony, we agree with the trial court that defendant failed to carry its burden with respect to this exception.

Additionally, defendant argues that the attorney-client privilege must give way to his superior right to confront his accusers. See U.S. Const. amend. VI. However, the right to confront one's accusers does not take precedence over the attorney client privilege. People v. Knight, 139 Ill. App. 3d 188, 194-95 (1985); People v. Jacobson, 119 Ill. App. 3d 103, 105 (1983). Like the right to confrontation, the attorney-client privilege is designed "to promote the judicial process itself." Knight, 139 Ill. App. 3d at 195. Thus, unlike some privileges deemed to be of secondary importance (see Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974) (holding right to confrontation superior to statutory provision making juvenile witnesses' records confidential), the attorney-client privilege does not give way to a defendant's right under the confrontation clause. Knight, 139 Ill. App. 3d at 195.

Defendant's contention that Solti waived the privilege by testifying that he had no opportunity to talk to Jones is unpersuasive. According to defendant, he should have been allowed to use Solti's meeting with Ritacca to impeach him on his point. However, Ritacca testified that he declined to deliver any message to Jones. In order to be admitted for impeachment purposes, evidence must contradict what a witness testifies to in court. Goldenberg v. Bazell, 219 Ill. App. 3d 672, 679 (1991). Since Ritacca declined to convey anything to Jones, nothing

occurred in their meeting with which Solti could have been impeached.

Defendant further asserts that the State waived the protection of the motion in limine by failing to object to defendant's questions as to whether Solti had asked anyone to communicate with Jones on his behalf. Solti replied "no." Assuming arguendo that Solti's response and the State's failure to object constituted a waiver of the privilege, a proposition for which defendant provides no authority, defendant should have sought to introduce the previously barred testimony of Ritacca at that time. Motions in limine are interlocutary in nature and are subject to reconsideration throughout the course of a trial. Cunningham v. Millers General Insurance Co., 227 Ill. App. 3d 201, 205 (1992). Defendant's failure to call his purported waiver to the court's attention during the trial waives the issue. Cf. People v. Pertz, 242 Ill. App. 3d 864, 903 (1993) (holding trial court's grant of a second motion in limine by the State, after denying an earlier similar motion, proper where new matters arose bearing on the motion's propriety).

Also, according to defendant, Solti's request that Ritacca deliver a letter to his codefendant demonstrated "Solti's intent to disclose to a third person the same subject matter he discussed with Ritacca." See In re Himmel, 125 Ill. 2d 531, 542 (1988) (holding that "matters intended by a client for disclosure by the client's attorney to third parties, who are not agents of either the client or the attorney, are not privileged"). Defendant relies on People v. Werhollick, 45 Ill. 2d 459, 462 (1970), where our supreme court found that an offer or acceptance made through defendant's attorney to become a witness for the State was not a privileged communication. We do not quarrel with this proposition of law. However, unlike Werhollick, where the content of the communication at issue was known, defendant has failed to establish the content of the letter Solti asked Ritacca to deliver. Ritacca testified he did not read it. Furthermore, Jones testified he had no idea from where the letter came. Solti denied

ever having seen it. Accordingly, defendant has not established what, if anything, Solti intended to communicate to a third person during his conversation with Ritacca.

Finally, defendant contends that Solti's request to Ritacca to deliver a letter to his codefendant was not a privileged communication. It is unclear as to what use defendant would have put this evidence. Since Ritacca declined to deliver the letter, Solti's request would support no inference of collaboration. That the request was made did contradict Solti's statement that he never asked anyone to communicate with Jones; however, it would in no way contradict Solti's testimony regarding defendant's involvement in the attack on Angela and it is difficult to see how it would have affected the outcome of the trial. See People v. Hanson, 44 Ill. App. 3d 977, 983-84 (1977) (finding error harmless where prior inconsistent statement only whether a second police officer was present while an officer performed a field test on contraband).

Accordingly, even if we were to conclude that this issue had not been waived, we would find no error in the trial court's grant of this motion in limine.

VI. CONCLUSION

For the foregoing reasons, the decision of the circuit court of Lake County is affirmed.

Affirmed.

GROMETER, J., with RAPP and CALLUM, JJ., concurring.

Supreme Court of Illinois

People

v.

Yechiel Abramov

NO. 91707

SEPTEMBER TERM, 2001
October 03, 2001

Lower Court: No. 2-99-0424

Disposition: Denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES ex rel. YECHIEL ABRAMOV (#B-71340),	)	
Petitioner,	)	
	)	Case No. 05 C 4795
v.	)	
NEDRA CHANDLER, Warden, Dixon Correctional Center,	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

Petitioner Yechiel Abramov, by counsel, filed the present petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254(d)(1). For the reasons discussed below, the Court denies Abramov's petition.

BACKGROUND

Abramov does not present clear and convincing evidence challenging the statement of facts set forth in the Illinois Appellate Court's opinions affirming the judgments of the Circuit Court of Lake County, and thus the Court presumes those facts are correct for purposes of its habeas review. *See* 28 U.S.C. § 2254(e)(1); *Whitman v. Bartow*, 434 F.3d 968, 969 (7th Cir. 2006). The Court, therefore, adopts the underlying facts as set forth by the Illinois AppellateCourt, Second Judicial District, in Abramov's direct and post-conviction appeals. *See People v.*

Abramov, No. 2-95-1401 (2d Dist. Apr. 14, 1997) (unpublished order) *People v. Abramov*, No. 2-99-0424 (2d Dist. Apr. 24, 2001) (unpublished order); *People v. Abramov*, No. 2-03-0540 (2d Dist. May 13, 2004) (unpublished order). The Court starts with a brief recounting of the facts as determined by the Illinois Appellate Court when it resolved Abramov's second direct appeal. *See Easley v. Frey*, 433 F.3d 969, 970 (7th Cir. 2006).

I. Factual Background

On April 12, 1995, Lamar Jones and Leroy Solti broke into Abramov's home located at 212 Killarney Road in Grayslake, Illinois. Abramov and his wife had moved into this home approximately five weeks earlier. At the time Jones and Solti broke into the home, Abramov's wife, Angela, and son were present while Abramov was at work. Jones and Solti stabbed and shot Angela. The men were apprehended shortly thereafter and told the police that Abramov had hired them to kill his wife.

At trial, Solti testified that he first became acquainted with Abramov when Solti took his car in for repairs at the automotive shop where Abramov worked. After receiving an estimate for his car repairs, Solti told Abramov that he did not have enough money to pay for the repairs. Abramov told Solti not to worry because he had a job for him to do. Specifically, Abramov asked Solti to kill his wife, Angela. Two other witnesses – Nathan Weaver and Eric Bell – testified at trial that Abramov had previously attempted to hire them to kill Angela. At that time, Abramov and his family lived in an apartment on Cicero Avenue in Chicago, Illinois. Although neither Weaver nor Bell intended to kill Angela, they let Abramov believe that they planned to kill her because Abramov paid them money. At one point, Weaver and Bell staged a robbery with Abramov's cooperation where they said they intended to kill Angela. They did not kill Angela, however, but took Abramov's money instead.

II. Procedural Background

Following a bench trial in the Circuit Court of Lake County, Illinois, the state court judge found Abramov guilty of three counts of solicitation of murder for hire and one count each of attempted first-degree murder, home invasion, armed violence, aggravated battery with a firearm, and conspiracy to commit first-degree murder. (R. 22-1, Respondent's Rule 5 Exs., Ex. C.) The Circuit Court then sentenced Abramov to concurrent terms of 35 years for each count of solicitation of murder for hire, 30 years for attempted first-degree murder, 30 years for aggravated battery with a firearm, and 15 years for conspiracy to commit first-degree murder. (*Id.*, Ex. A.)

Abramov appealed his conviction and sentence to the Illinois Appellate Court, Second District. On April 14, 1997, the Illinois Appellate Court reversed and remanded Abramov's case for a new trial due to constitutionally ineffective assistance of counsel. (*Id.*, Ex. C.) The State then filed a petition for leave to appeal ("PLA") to the Illinois Supreme Court that the court denied on October 1, 1997. (*Id.*, Exs. D, E.)

After the second bench trial before the Circuit Court of Lake County, the state court judge convicted Abramov of one count each of solicitation for murder for hire, attempted first degree murder, and aggravated battery with a firearm. (*Id.*, Ex. H.) The Circuit Court then sentenced Abramov to two concurrent 29-year terms of imprisonment for solicitation of murder for hire and attempted first degree murder, and also sentenced Abramov to a consecutive 6-year term for aggravated battery for a total of 35 years' imprisonment. (*Id.*)

Thereafter, Abramov appealed his conviction and sentence to the Illinois Appellate Court, Second District, raising the following issues: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) venue was improper for one count of the indictment; (3) the trial court erred in denying his

motion to dismiss and motion *in limine* based on the State's discovery violations; and (4) the trial court improperly granted the State's motion *in limine* barring cross-examination of cooperating witness Solti concerning his conversation with his attorney based on the attorney-client privilege. (*Id.*, Exs. F, H.) On April 24, 2001, the Illinois Appellate Court, Second District, affirmed the conviction and sentence. (*Id.*, Ex. H.)

Abramov then filed a PLA to the Illinois Supreme Court, raising the following claims: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred in denying his motion to dismiss and motion *in limine* based on the State's discovery violations; and (3) the trial court improperly granted the State's motion *in limine* barring cross-examination of Solti about his conversation with his attorney based on the attorney-client privilege. (*Id.*, Ex. I.) On October 3, 2001, the Illinois Supreme Court denied Abramov's PLA. (*Id.*, Ex. J.)

On April 8, 2002, Abramov filed a petition pursuant to the Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.*, and on February 28, 2003, Abramov filed an amended post-conviction petition. In his amended petition, Abramov raised the following arguments: (1) the prosecution of his second trial was improper because it was conducted, in part, by an assistant Illinois appellate prosecutor; (2) ineffective assistance of trial and appellate counsel; (3) the trial court erred in imposing a consecutive sentence on his conviction for aggravated battery with a firearm; (4) the trial court improperly shifted the burden of proof to Abramov; and (5) the trial court improperly granted the State's motion *in limine* barring cross-examination of Solti about his conversation with his attorney based on the attorney-client privilege. (*Id.*, Ex. K.) On April 24, 2003, the Circuit Court of Lake County dismissed Abramov's post-conviction petition. (*Id.*, Ex. L.)

Abramov appealed the dismissal of his post-conviction petition to the Illinois Appellate Court, Second District, raising

the following claims: (1) ineffective assistance of trial and appellate counsel; (2) the post-conviction court erred in failing to grant relief where law enforcement officials either lost or destroyed tape-recorded conversations; and (3) the post-conviction court erred in perpetuating the exclusion of evidence regarding conversations between Solti and his attorney. (*Id.*, Ex. M.) On May 13, 2004, the Illinois Appellate Court, Second District, affirmed the trial court's dismissal of Abramov's post-conviction petition. (*Id.*, Ex. O.)

Abramov then filed a PLA to the Illinois Supreme Court asserting these claims: (1) the prosecution of his second trial was improper because it was conducted, in part, by an assistant Illinois appellate prosecutor; (2) the post-conviction court erred in failing to grant relief where law enforcement officials either lost or destroyed tape-recorded conversations; and (3) the post-conviction court erred in perpetuating the exclusion of evidence regarding conversations between Solti and his attorney. (*Id.*, Ex. P.) On October 6, 2004, the Illinois Supreme Court denied Abramov's PLA. (*Id.*, Ex. Q.)

On August 19, 2005, Abramov filed the present habeas petition pursuant to 28 U.S.C. § 2254(d)(1) raising the following constitutional claims: (1) the trial court violated his rights under the Confrontation Clause of the Sixth Amendment when the court granted the State's motion *in limine* to bar cross-examination of Solti concerning his conversation with his attorney; (2) the State did not prove him guilty beyond a reasonable doubt and the trial court improperly shifted the burden of proof to Abramov; and (3) the State violated his rights to due process, to a fair trial, and to confront witnesses when the State lost or destroyed tape recordings of telephone conversations between Abramov and law enforcement officers, but allowed the police officers to testify about the content of the tape recordings. (R. 1-1, Petition for Writ of Habeas Corpus.)

LEGAL STANDARDS

I. Habeas Standard

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a court cannot grant habeas relief unless the state court's decision was contrary to, or an unreasonable application of law clearly established by the Supreme Court. *Dunlap v. Hepp*, 436 F.3d 739, 741 (7th Cir. 2006); *see also Williams v. Taylor*, 529 U.S. 362, 402-03, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In *Williams*, the Supreme Court explained that a state court's decision is "contrary to" clearly established Supreme Court law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Id.* at 405.

Under the "unreasonable application" prong of the AEDPA standard, a habeas petitioner must demonstrate that although the state court identified the correct legal rule, it unreasonably applied the controlling law to the facts of the case. *Id.* at 407. "This reasonableness determination is quite deferential, such that a state decision may stand as long as it is objectively reasonable, even if the reviewing court determines it to be substantively incorrect." *Barrow v. Uchtman*, 398 F.3d 597, 602 (7th Cir. 2005); *see also Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005) (state court decision must be objectively unreasonable). In other words, "[e]ven if the state court erroneously applied federal law, [courts] may only grant the writ if the decision was objectively unreasonable." *Walker v. Litscher*, 421 F.3d 549, 554 (7th Cir. 2005).

To be considered "unreasonable," a state court's decision must lie "well outside the boundaries of permissible differences of opinion." *Woods v. McBride*, 430 F.3d 813, 816-17 (7th Cir.

2005) (quoting *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002)); *see also Dunlap*, 436 F.3d at 745 (to be reasonable, state court decision must be minimally consistent with facts and circumstances of case); *Hubanks v. Frank*, 392 F.3d 926, 929 (7th Cir. 2004) (reasonable state court decision one of several equally plausible outcomes).

II. Procedural Default

Before bringing a habeas claim in federal court, the petitioner must exhaust all remedies available to him in state court. *Bintz v. Bertrand*, 403 F.3d 859, 863 (7th Cir. 2005). Specifically, the "petitioner must establish that he fully and fairly presented his claims to the state appellate courts, thus giving the state courts a meaningful opportunity to consider the substance of the claims that he later presents in his federal challenge." *Id.*; *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 848, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). Fair presentment requires the petitioner to set forth the operative facts and controlling legal principles for each of his claims. *Bintz*, 403 F.3d at 863. "A habeas petitioner who has exhausted his state court remedies without properly asserting his federal claim at each level of state court review has procedurally defaulted that claim." *Lewis v. Sternes*, 390 F.3d 1019, 1026 (7th Cir. 2004). In addition, a habeas claim is procedurally defaulted when the state court did not address the petitioner's federal claim because the petitioner failed to meet independent and adequate state procedural requirements. *Stewart v. Smith*, 536 U.S. 856, 860-61, 122 S.Ct. 2578, 2581,153 L.Ed.2d 762 (2002); *see also Coleman v. Thompson*, 501 U.S. 729, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991).

A habeas petitioner may overcome procedural default by demonstrating cause for the default and actual prejudice as a result of the alleged violation of federal law or by showing that the Court's failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

The Supreme Court defines cause sufficient to excuse procedural default as "some objective factor external to the defense" which prevents a petitioner from pursuing his constitutional claim in state court. *Murray v. Carrier,* 477 U.S. 478, 492, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). A fundamental miscarriage of justice occurs when a petitioner establishes that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 496.

ANALYSIS

I. Confrontation Clause Claim

A. Procedural Default

Respondent contends that Abramov's habeas claim based on the Confrontation Clause claim is procedurally defaulted because the Illinois Appellate Court rejected this claim based on both waiver and a merits determination. Respondent thus argues that the Illinois Appellate Court based its decision on an independent and adequate state law ground. *See Gomez v. Jaimet,* 350 F.3d 673, 678 (7th Cir. 2003) (under Illinois law, waiver operates as independent and adequate state ground barring federal habeas review). In general, federal courts cannot review questions of federal law if the state court decision rests on a state procedural ground that is independent of the federal question and adequate to support the judgment. *See Harris v. Reed,* 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). In other words:

> When the last state court to issue an opinion on a petitioner's federal claim has resolved that claim on an adequate and independent state ground, federal habeas review of the claim is foreclosed. Typically this occurs when the petitioner failed to comply with a state procedural rule and the state court relied on that procedural default to refrain

from reaching the merits of the federal claim.

Miranda v. Leibach, 394 F.3d 984, 99-92 (7th Cir. 2005) (internal citation omitted).

When a state appellate court bases its decision on both the petitioner's procedural default and a review of the merits a "petitioner's procedural default will bar federal habeas review only if the state court actually relied on that default as an independent basis for its decision." *Hampton v. Leibach,* 347 F.3d 219, 242 (7th Cir. 2003) (citing *Harris v. Reed*, 489 U.S. at 261-62)). Thus, under the circumstances, the Court must determine whether the Illinois Appellate Court's decision primarily relied on its merits determination, the procedural default, or a combination of both. *See Farmer v. Litscher,* 303 F.3d 840, 846 (7th Cir. 2002).

Although the Illinois Appellate Court discussed Abramov's waiver of his Confrontation Clause argument, the court spent the majority of its decision giving a detailed merits analysis of Abramov's claim. *See People v. Abramov,* No. 2-99-0424, at *17-20. In other words, the appellate court did not expressly decide this claim based on waiver alone. *See Harding v. Sternes,* 380 F.3d 1034, 1043-44 (7th Cir. 2004). Under these circumstances, the Court would be hard-pressed to conclude that Abramov's claim is procedurally defaulted. The Court turns to the merits of Abramov's Confrontation Clause claim.

B. Merits Determination

1. Facts

Abramov's Confrontation Clause claim is based on the following facts as determined by the Illinois Appellate Court in his second direct appeal. Prior to Abramov's first trial, Solti requested that attorney Robert Ritacca visit him at the Lake County Jail. Solti wanted Ritacca to evaluate the circumstances

surrounding his guilty plea regarding the attack on Abramov's wife to determine if Ritacca could negotiate a more favorable plea agreement. Solti told Ritacca a version of the facts that differed substantially from what he had stated at trial. Ritacca testified that Solti asked him to deliver a letter to Lamar Jones, his co-defendant. Ritacca declined to do so and Solti terminated the visit. Subsequently, Ritacca communicated these events to Abramov's first attorney. *See People v. Abramov,* No. 2-99-0424, at *15-16.

The State filed a motion *in limine* seeking to bar Abramov from cross-examining Solti regarding this conversation based on the attorney-client privilege. The trial court concluded that the State had fulfilled its burden in showing that the attorney-client privilege attached to the conversation, and granted the State's motion. In the course of its ruling, the trial court found that Abramov had not established that the crime-fraud exception vitiated the attorney-client privilege, and that the right to confront one's accusers did not trump Solti's attorney-client privilege. *See id.,* No. 2-99-0424, at *15-20.

2. The Right to Confront Witnesses

The Sixth Amendment to the United States Constitution guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. CONST., amend. VI; *Dunlap v. Hepp,* 436 F.3d 739, 741 (7th Cir. 2006). This "confrontation" means more than confronting witnesses physically – the primary interest secured by the Confrontation Clause is the right of cross-examination. *Davis v. Alaska,* 415 U.S. 308, 315-16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Dunlap,* 436 F.3d at 741. Nonetheless, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van*

Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674, 683 (1986). "[T]he Confrontation Clause guarantees an ***opportunity*** for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer,* 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (per curiam) (emphasis in original); *see also Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973) (confrontation and cross-examination rights "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process").

3. Attorney-Client Privilege

Here, Abramov contends that the State's successful motion *in limine* based on the attorney-client privilege precluded him from cross-examining Solti concerning Solti's discussion with Ritacca at the Lake County Jail prior to Abramov's first bench trial. Abramov bears the burden of establishing that the state court applied federal constitutional law as determined by the United States Supreme Court to the facts of his case in an objectively unreasonable manner. *See Woodford v. Visciotti,* 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam).

First, Abramov asserts that the Illinois Appellate Court's decision was an unreasonable application of clearly established Supreme Court law when it determined that the attorney-client privilege trumped defendant's constitutional right to confront his accusers. When analyzing this claim, the Illinois Appellate Court determined:

> [T]he right to confront one's accusers does not take precedence over the attorney-client privilege. Like the right to confrontation, the attorney-client privilege is designed "to promote the judicial process itself." Thus, unlike some privileges

> deemed to be of secondary importance, the attorney-client privilege does not give way to a defendant's right under the confrontation clause.

People v. Abramov, No. 2-99-0424, at *18 (internal citations omitted).

Abramov admits that the "United States Supreme Court has not yet addressed the precise issue raised here – a clash between a criminal defendant's Constitutional rights and an assertion of the attorney-client privilege." (R. 2-1, Memo. in Support of Section 2254 Petition at 39.) Instead, Abramov relies on Circuit Court precedent, including the Seventh Circuit's decision in *United States v. Rainone,* 32 F.3d 1203, 1206 (7th Cir. 1994), in which the court stated:

> Evidentiary privileges are not absolute, however. Even privileges recognized when the Constitution was written can be trumped by constitutional rights, such as the right of confrontation conferred by the Sixth Amendment and interpreted to include the right of cross-examination. *Olden v. Kentucky,* 488 U.S. 227, 231, 109 S.Ct. 480, 482, 102 L.Ed.2d 513 (1988) (per curiam); *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); John W. Strong, McCormick on Evidence § 74.2, at pp. 279-81 (4th ed. 1992). Even the attorney-client privilege, therefore, hallowed as it is, yet not found in the Constitution, might have to yield in a particular case if the right of confrontation, whether in its aspect as the right of cross-examination or in some other aspect, would be violated by enforcing the privilege. So at least dicta in two cases intimate. *United States ex rel. Blackwell v. Franzen,* 688 F.2d 496, 501 (7th Cir. 1982); *Jenkins v. Wainwright,* 763 F.2d 1390,

1392-93 (11th Cir. 1985).

Not only does the Seventh Circuit admittedly rely on dicta in making its determination, but under the AEDPA, the Court's focus is whether the Illinois Appellate Court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, ***clearly established Federal law, as determined by the Supreme Court of the United States***." 28 U.S.C. § 2254(d)(1) (emphasis added). Therefore, Abramov's reliance on the *Rainone* decision cannot serve as the basis for a finding that the Illinois Appellate Court's decision involved an unreasonable application of clearly established federal law as determined by the Supreme Court. *See Sweeney v. Carter,* 361 F.3d 327, 333-34 (7th Cir. 2004); *Young v. Walls,* 311 F.3d 846, 849 (7th Cir. 2002).

4. The Crime-Fraud Exception

Next, Abramov argues that Illinois Appellate Court's ruling that he did not establish the crime-fraud exception to the attorney-client privilege was an unreasonable application of clearly established federal law as determined by the Supreme Court. Abramov again fails to identify clearly established Supreme Court precedent in support of this argument.[1] *See Yancey v. Gilmore,* 113 F.3d 104, 108 (7th Cir. 1997) (because petitioner cannot point to clearly established Supreme Court precedent for his argument, he does not meet the standard for relief imposed by Section 2254(d)(1)).

---

[1] Abramov does, however, outline the contours of the Confrontation Clause by citing *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) and *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), among other cases.

Nevertheless, in analyzing Abramov's crime-fraud exception argument, the Illinois Appellate Court stated the following:

> Defendant also argues that the crime-fraud exception applies in this case and renders the conversation between Solti and Ritacca unprivileged. According to defendant, Solti was seeking Ritacca's services in order to seek a better plea agreement by perjuring himself. The party asserting this exception bears the burden of proving its applicability. The trial court concluded that defendant had not met this burden. Prior to ruling the exception did not apply, the court heard testimony from Ritacca, which it described as "all over the page." For example, Ritacca testified that he was unsure at [sic] to whether Solti had given a statement to the police, how Solti's testimony would differ, whether Solti was represented at the time, and how large Solti's police report was. Given the quality of Ritacca's testimony, we agree with the trial court that defendant failed to carry its burden with respect to this exception.

People v. Abramov, No. 2-99-0424, at *17-18 (internal citations omitted).

In attacking the Illinois court's crime-fraud exception analysis, Abramov argues that although Ritacca could not recall certain, irrelevant details of his conversation with Solti, Ritacca was clear and unwavering about the facts that pertained to the attorney-client privilege. (R. 2-1, Memo. in Support of Section 2254 Petition at 27.) Abramov then gives his version of the facts citing to the trial court record and argues how counsel would have impeached Solti based on the discussion with Ritacca and concludes that the Illinois Appellate Court's decision was "based

on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *See* 28 U.S.C. § 2254(d)(2). In essence, it appears that Abramov is challenging the state court's factual determinations. *See, e.g., Miller-El v. Dretke,* 545 U.S. 231, 125 S.Ct. 2317, 2325, 162 L.Ed.2d 196 (2005). Abramov, however, does not attempt to rebut the presumption that the state court's factual findings are correct. *See* 28 U.S.C. § 2254(e)(1); *Ruvalcaba v. Chandler,* 416 F.3d 555, 559-60 (7th Cir. 2005) (petitioner must offer clear and convincing evidence to rebut statutory presumption that state court's factual findings are correct).[2] Without more, Abramov's crime-fraud exception argument fails. *See Doherty v. City of Chicago,* 75 F.3d 318, 324 (7th Cir. 1996) ("it is not the role of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel.") (citation omitted).

Abramov's Confrontation Clause arguments thus fail because Abramov did not support his arguments with clearly established federal law as determined by the Supreme Court of the United States. *See* 28 U.S.C. §§ 2254(d)(1). He further failed to offer clear and convincing evidence to rebut the presumption that the state court's factual findings were correct. *See* 28 U.S.C. §§ 2254(e)(1).

---

[2] Oddly enough, in his reply brief, Abramov asserts that he is not challenging the state court's factual findings because the court's factual findings were irrelevant to whether the attorney-client privilege applied. (R. 27-1, Reply Mem. of Law in Resp. to State's Answer at 11).

II. Sufficiency of the Evidence

Next, Abramov contends that the evidence presented at trial was legally insufficient to support his convictions.[3] In general, a defendant who challenges the sufficiency of the evidence faces a nearly insurmountable task. *See United States v. Gougis,* 432 F.3d 735, 744 (7th Cir. 2005). When assessing a sufficiency of the evidence claim, the reviewing court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, ***any*** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original). The standard under *Jackson* "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* Courts defer to a fact finder's credibility determinations and will overturn verdicts only if "the record contains no evidence, regardless of how it is weighed, upon which a rational trier of fact could find guilt beyond a reasonable doubt." *United States v. Cummings,* 395 F.3d 392, 397 (7th Cir. 2005) (citation omitted); *see also United States v. Kapp,* 419 F.3d 666, 668, 672 (7th Cir. 2005) ("In short, we must determine 'whether the fact finder's take on the evidence was wholly irrational.'") (citation omitted).

Here, Abramov admits that the State's four chief witnesses – Solti, Jones, Weaver, and Bell – testified that Abramov personally solicited them to kill his wife. Nevertheless,

---

[3] In his habeas petition, Abramov also argues that the trial court improperly shifted the burden of proof to him. Abramov, however, does not develop this argument in his legal memoranda, and therefore, he has waived it. *See Estate of Moreland v. Dieter,* 395 F.3d 747, 759 (7th Cir. 2005) (perfunctory and undeveloped arguments are waived).

Abramov argues that the evidence is legally insufficient because these witnesses were impeached, biased, and testified inconsistently. Abramov argues that the trial judge could not have concluded that these individuals were credible or that their testimony was truthful. Based on this argument, Abramov asserts that the Illinois Appellate Court's decision was an unreasonable application of *Jackson*.

In analyzing this claim, the Illinois Appellate Court first discussed Abramov's arguments concerning the impeachment of the State's witnesses:

> Defendant asserts that the testimony of Jones, Solti, Weaver, and Bell is not worthy of belief. Defendant first notes that each was a convicted felon and admitted gangmember. Furthermore, Solti and Jones testified as part of a plea agreement, while Weaver and Bell were never prosecuted for the staged robbery of defendant and his wife. The trial court was, however, presented with this potentially impeaching information, and it was the trial court's role to weigh this evidence and determine defendant's guilt or innocence. We will not substitute our judgment for that of the trial court, which had the opportunity to observe these witnesses' testimony first hand.

People v. Abramov, No. 2-99-0424, at *4 (internal citations omitted).

The Illinois Appellate Court then discussed in detail Abramov's argument concerning the witnesses' inconsistent statements:

> These inconsistencies undoubtedly exist; however, defendant's argument ignores other

evidence which corroborates the testimony of these witnesses. Weaver, Bell, Solti, and Jones were aware of various details of defendant's life which would have been difficult, if not impossible, for them to learn from any source other than defendant. First, Weaver testified that defendant told him Angela always wore a pair of diamond earrings. Angela confirmed this fact during her testimony. Second, both Weaver and Bell testified that defendant instructed them to follow Angela and her mother to a mall and kill her there. Defendant told them that his mother-in-law drove a gray car. Angela's mother testified that she drove a gray car at that time. Both testified that they would regularly go to a mall together when Angela's mother came over on one of her regular afternoon visits. Third, Campbell [Bell's girlfriend] described defendant's work uniform and picked him out of a photographic lineup, despite defendant's assertion that he never met her.... Weaver and Bell testified that prior to the staged robbery where they were to kill Angela, defendant showed them that he was carrying a large sum of money. During the staged robbery, after the defendant produced some money, Weaver demanded more, indicating he knew defendant was carrying more money than he initially produced. Furthermore, Angela testified that it was not customary for defendant to carry a lot of money, however, on that occasion, he took a lot of money from the apartment with him. Ninth, Bell and Weaver both knew defendant's new home in Grayslake was near the railroad tracks. Bell's testimony that this house was the second one on the left from a stop sign was confirmed by Angela.... Twelfth, Solti testified that defendant showed him a little

over $1,000 in cash the night before the attack. Defendant testified that he closed a bank account and withdrew about $1,200 the day before the attack and paid the money to an attorney the evening of the day of the attack. Defendant offers no plausible explanation of how these witnesses could have learned these facts from a source other than defendant.

Furthermore, Solti, Jones, Weaver, and Bell all testified consistently that defendant instructed them to not hurt his son. Solti and Jones testified that they were to put the child in another room, and Solti added they were to lock the door to the room. Angela testified that one of her attackers immediately took the child to another room, and that after the attack, she had to break down the door to the room where the child was because it was locked.

In finding defendant guilty, the trial court, in addition to the knowledge Solti and Jones possessed which could only have come from defendant, relied on the nature of the events which took place during the attack on Angela. The trial court noted that the attack appeared to be an execution rather than a robbery. This finding comports with the evidence presented in the case. At the time Solti and Jones entered the house, they were aware that Angela was home because Solti had previously knocked on the door and been denied access. They drove all the way from Evanston to Grayslake to get to defendant's house, which was located in a subdivision that was transversed by curving roads. That they made this trip indicates that they were not interested in burglarizing any house, rather, they were

> targeting the house where Angela resided. Defendant's house was sparsely furnished, so upon looking in through the patio door before breaking in, Solti and Jones would not have seen much to steal. Finally, Solti and Jones left two items of jewelry lying on the floor where the attack occurred.
>
> Substantial evidence existed that supported the trial court's judgment regarding defendant's guilt. Conflicts in the evidence did exist, and the State's primary witnesses were felons and gangmembers. However, it was the trial court's function to resolve these conflicts and assess the credibility of these witnesses. [citation omitted]. Given the substantial evidence indicating guilt, we cannot conclude that defendant was not proven guilty beyond a reasonable doubt.

People v. Abramov, No. 2-99-0424, at *7-10.

Abramov argues that the Illinois Appellate Court's determination is an unreasonable application of *Jackson* because "the trial judge, sitting as the trier of fact, did not conclude guilt on the basis that these individuals were credible, or that the trial testimony they gave was truthful." (R. 2-1, Memo. in Support of Section 2254 Petition at 39.) Instead, Abramov argues that "the judge determined that, given what had happened at the Abramovs' Grayslake home on April 12, the home invasion was not a robbery, but an execution. From that conclusion, the trial judge decided that there was only one reason why Solti and Jones would be interested in killing Angela and that was because the defendant had asked them to do so." (*Id.*) (emphasis in original).

In short, Abramov takes umbrage with the fact that the trial court made inferences based on the evidence presented at trial. Under the *Jackson* analysis, however, the State is entitled

to every reasonable inference that the trial court can draw from the evidence if the inference has some support in the facts. *See McFowler v. Jaimet,* 349 F.3d 436, 451-52 (7th Cir. 2003). Here, there is substantial evidence that Abramov asked Solti and Jones to kill his wife. Further, Abramov's argument also asks the Court to overlook the trial court's credibility determinations and to determine the witnesses' credibility itself, which is not appropriate under *Jackson* or the AEDPA. *See Jackson,* 443 U.S. at 319 (it is the "responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts"); *Miller-El v. Cockrell*, 537 U.S. 322, 339, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (state court's factual findings, including credibility determinations, accorded significant deference on collateral review).

In any event, the Court focuses on the Illinois Appellate Court's decision because it was the last court to make a merits determination on Abramov's *Jackson* claim. *See Sanders v. Cotton,* 398 F.3d 572, 579 (7th Cir. 2005). In analyzing Abramov's argument that the evidence was legally insufficient because Solti, Jones, Bell, and Weaver were impeached and their testimony was biased and inconsistent, the Illinois Appellate Court not only defers to the trial court's credibility determinations, but explains the detailed evidence presented at trial that Abramov asked Jones and Solti to kill his wife and that Abramov had previously asked Bell and Weaver to do the same. The appellate court noted the inconsistencies in the witnesses' testimony, but also highlighted the substantial evidence which corroborated the testimony of these witnesses. The Illinois Appellate Court, for example, analyzed the evidence showing that Weaver, Bell, Solti, and Jones were aware of various details of defendant's life "which would have been difficult, if not impossible, for them to learn from any source other than defendant." *People v. Abramov,* No. 2-99-0424, at *7.

Abramov's attempt at attacking each of the witnesses's testimony without considering the evidence as a whole misses the point. *See Trejo v. Hulick,* 380 F.3d 1031, 1032 (7th Cir. 2004) (petitioner failed to consider "that the whole might be greater than the sum of the parts"). In other words, Abramov's attempt at characterizing the trial evidence as "slight wisps of circumstantial evidence," cannot be reconciled with the four key witnesses' testimony that Abramov solicited them to murder his wife Angela and the fact that this testimony was corroborated by other evidence, including Angela's own testimony. As such, viewing the evidence in a light most favorable to the State, any rational fact finder could have found the essential elements of solicitation of murder for hire beyond a reasonable doubt. *See Jackson,* 443 U.S. at 319.

Based on the Illinois Appellate Court's detailed and thorough analysis, the Court would be hard-pressed to concluded that its decision lies "well outside the boundaries of permissible differences of opinion." *Woods v. McBride,* 430 F.3d at 816-17. Instead, the state appellate court's decision is consistent with the facts and circumstances of case, *see Dunlap,* 436 F.3d at 745, and thus Abramov has failed in his burden of establishing that the Illinois Appellate Court applied *Jackson* in an objectively unreasonable manner. *See Woodford v. Visciotti,* 537 U.S. at 24-25. The Court thus denies Abramov's insufficiency of the evidence claim.

III. Destruction of Evidence – Tape Recordings

In Abramov's last habeas claim, he argues that the trial court erred by failing to sanction the State for losing or destroying tape-recorded conversations and then permitting the State to substitute the live testimony of the police officers. Respondent argues that Abramov failed to fully and fairly present this claim to the Illinois courts, and thus has procedurally defaulted this claim.

Due to federal-state comity, a petitioner seeking habeas relief in federal court must establish that he has "fully and fairly" presented his claims to the state courts. *See Bintz,* 403 F.3d at 863; *Dellinger v. Bowen,* 301 F.3d 758, 764 (7th Cir. 2002). A full and fair presentment requires a petitioner to present both the operative facts and controlling legal principles to the state courts – a mere reference to a constitutional issue is not enough. *Sanders v. Cotton,* 398 F.3d 572, 580 (7th Cir. 2005); *Chambers v. McCaughtry,* 264 F.3d 732, 737-38 (7th Cir. 2001). The Seventh Circuit has set forth several factors courts consider when making this determination, including whether: (1) petitioner relied on federal cases that engage in constitutional analysis; (2) petitioner relied on state cases which apply a constitutional analysis to similar facts; (3) petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; or (4) petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation. *Sanders,* 398 F.3d at 580. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *See Anderson v. Harless,* 459 U.S. 4, 6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982) (per curiam) (internal citation omitted). Instead, if a petitioner has not fully and fairly presented his habeas claim to the state courts, federal courts are procedurally barred from reviewing the claim on collateral review. *Chambers,* 264 F.3d at 737.

In his second direct appeal, Abramov framed the present habeas claim not only by arguing that it constituted a discovery violation, but also that the discovery violation amounted to a constitutional violation. Specifically, Abramov argued that the "tapes containing Defendant's conversations with the police which were lost or destroyed by the State violated the Defendant's right to a fair trial, right to confront the witnesses against him, and right to due process." (R. 22- 1, Respondent's Rule 5 Exs., Ex. F, at 42-43.) Abramov also outlined the facts regarding the police officers' testimony. (*Id.* at 3-5.) Accordingly, Abramov framed his claim in terms so particular as

to call to mind specific constitutional rights, namely, that the State violated his "right to a fair trial," "right to confront witnesses," and "right to due process." *See Sanders,* 398 F.3d at 580.

Abramov, however, failed to fully and fairly present his habeas claim in his petition for leave to appeal to the Illinois Supreme Court. In his PLA, Abramov's argument is based entirely on the alleged discovery violations for the loss or destruction of the tapes. (R. 22-1, Respondent's Rule 5 Exs., Ex. I at 19-20.) At no point in his argument does he claim that the State or the trial court violated his right to a fair trial, right to confront witnesses, or his due process rights. Moreover, Abramov neither cites to any Illinois cases that apply a constitutional analysis to similar facts or to any federal case law. *See Sanders,* 398 F.3d at 580. Although Abramov argues that the substance of his claim was the same on direct appeal and in his petition for leave to appeal, a "somewhat similar" state law claim is not enough for the Court to conclude that he fully and fairly presented his constitutional claim to the Illinois Supreme Court. *See Anderson v. Harless,* 459 U.S. at 6.

Abramov did not fully and fairly present his claims to both the Illinois Appellate Court and Illinois Supreme Court allowing the courts "a meaningful opportunity to consider the substance of the claims that he later present[ed] in his federal challenge." *Bintz,* 403 F.3d at 863; *see also Lewis,* 390 F.3d at 1026 (7th Cir. 2004) ("habeas petitioner who has exhausted his state court remedies without properly asserting his federal claim at each level of state court review has procedurally defaulted that claim"). As such, Abramov has procedurally defaulted this habeas claim. Because Abramov has not presented any arguments to overcome this default, *see Coleman,* 501 U.S. at 750, the Court is barred from reviewing this last habeas claim on collateral review.

CONCLUSION

For these reasons, the Court denies Abramov's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254(d)(1).

Dated: May 17, 2006

ENTERED

/s/
AMY J. ST. EVE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES ex rel. YECHIEL ABRAMOV (#B-71340), Petitioner,	)	
	)	Case No. 05 C 4795
v.	)	
NEDRA CHANDLER, Warden, Dixon Correctional Center,	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

Habeas petitioner Yechiel Abramov, by counsel, has filed the present application for a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2253(c)(2) and Federal Rule of Appellate Procedure 22(b). Abramov seeks to appeal the Court's May 17, 2006, Memorandum, Opinion, and Order denying all of his habeas claims under 28 U.S.C. § 2254(d). For the following reasons, the Court denies Abramov's request for a COA.

BACKGROUND

I. Factual Background

On April 12, 1995, Lamar Jones and Leroy Solti broke into Abramov's home in Grayslake, Illinois. At that time, Abramov's wife, Angela, and his son were home and Abramov was at work. Jones and Solti stabbed and shot Angela. The police apprehended Jones and Solti shortly thereafter at which time they told the police that Abramov had hired them to kill his wife.

At trial, Solti testified that he first became acquainted with Abramov when he took his car in for repairs at the automotive shop where Abramov worked. After receiving an estimate for his car repairs, Solti told Abramov that he could not afford the repairs. Abramov then told Solti not to worry because he had a job for him to do. Abramov consequently asked Solti to kill his
wife, Angela.

Two other trial witnesses, Nathan Weaver and Eric Bell, testified that Abramov had previously attempted to hire them to kill Angela. At that time, Abramov and his family were living in an apartment on Cicero Avenue in Chicago, Illinois. Although neither Weaver nor Bell intended to kill Angela, they let Abramov believe that they were going to kill her because Abramov gave them money. At one point, Weaver and Bell staged a robbery with Abramov's cooperation where they were going to kill Angela. They did not kill her, however, but took Abramov's money instead.

After his second bench trial before the Circuit Court of Lake County, Illinois, the state court judge convicted Abramov of one count each of solicitation for murder for hire, attempted first-degree murder, and aggravated battery with a firearm. The Circuit Court sentenced Abramov to two concurrent 29-year terms of imprisonment for solicitation of murder for hire and attempted first degree murder. The trial court also sentenced Abramov to a consecutive 6-year term for aggravated battery.

II. Federal Court Procedural Background

On August 19, 2005, Abramov filed his habeas petition pursuant to 28 U.S.C. § 2254(d) raising the following claims: (1) the State violated his rights to due process, to a fair trial, and to confront witnesses when the State lost or destroyed tape recordings of telephone conversations between Abramov and law enforcement officers, but allowed the police officers to testify

about the content of the tape recordings at trial; (2) the trial court violated his rights under the Confrontation Clause of the Sixth Amendment when the court granted the State's motion *in limine* to bar cross-examination of Solti concerning his conversation with his attorney; and (3) the State did not prove him guilty beyond a reasonable doubt.

In denying Abramov's habeas petition, the Court reached the merits of Abramov's Confrontation Clause and sufficiency of the evidence claims concluding that the Illinois Appellate Court's decision was not an unreasonable application of clearly established Supreme Court law. *See Williams v. Taylor*, 529 U.S. 362, 402-03, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Dunlap v. Hepp*, 436 F.3d 739, 741 (7th Cir. 2006). As to Abramov's destruction of evidence claim, the Court concluded that he did not fully and fairly present both the operative facts and controlling legal principles to the Illinois Supreme Court in his petition for leave to appeal. *See Bintz v. Bertrand*, 403 F.3d 859, 863 (7th Cir. 2005). As such, Abramov procedurally defaulted this claim, *see Lewis v. Sternes*, 390 F.3d 1019, 1026 (7th Cir. 2004), and did not argue or establish an exception to overcome this procedural default. *See Coleman v. Thompson*, 501 U.S. 729, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991).

LEGAL STANDARD

Under 28 U.S.C. § 2253, a habeas petitioner does not have the absolute right to appeal a district court's denial of his habeas petition; instead, he must first request a certificate of appealability. *See Miller-El v. Cockrell*, 537 U.S. 322, 335, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003). "The purpose of requiring a certificate of appealability is to conserve judicial resources by screening out clearly unmeritorious appeals." *Buie v. McAdory*, 322 F.3d 980, 981 (7th Cir. 2003). A habeas petitioner is entitled to a certificate of appealability only if he can make a substantial showing of the denial of a constitutional right. *Miller-El*, 537 U.S. at 336; *Cosby v. Sigler*, 435 F.3d 702, 708

(7th Cir. 2006). Under this standard, Abramov must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El,* 537 U.S. at 336 (quoting *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)). While a petitioner seeking a COA need not demonstrate that he will prevail on appeal, he "must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." *Miller-El,* 537 U.S. at 338 (internal quotation marks and citation omitted). The Court's "determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* at 336.

ANALYSIS

I. Destruction of Evidence

A. Actual Innocence

Previously, Abramov claimed that he was innocent of soliciting Jones, Solti, Bell, and Weaver to murder his wife. For the first time in his COA application, Abramov attempts to develop an "actual innocence" argument. Although claims of actual innocence are not cognizable as stand alone claims on federal habeas review, actual innocence relates to the "fundamental miscarriage of justice exception" providing a gateway for the Court to review Abramov's procedurally defaulted claim concerning the destruction of tape recordings. *See Herrera v. Collins,* 506 U.S. 390, 400, 404, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

To establish actual innocence, a petitioner must support his allegations "with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial."

Schlup v. Delo, 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *see also Gomez v. Jaimet,* 350 F.3d 673, 679 (7th Cir. 2003). The petitioner must also establish that "it was more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup,* 513 U.S. at 327. "To demonstrate innocence so convincingly that no reasonable jury could convict, a prisoner must have documentary, biological (DNA), or other powerful evidence: perhaps some non-relative who placed him out of the city, with credit card slips, photographs, and phone logs to back up the claim." *Hayes v. Battaglia,* 403 F.3d 935, 938 (7th Cir. 2005). Because this type of evidence is unavailable in the vast majority of cases, actual innocence claims are rarely successful. *See Schlup,* 513 U.S. at 324.

Here, Abramov has failed to present any new evidence that was not presented at trial to establish his actual innocence claim. Indeed, Abramov does not point to any evidence – new or old – to support this claim. Accordingly, the Court cannot reach the merits of his procedurally defaulted claim because Abramov has failed in establishing the miscarriage of justice exception to overcome his procedural default. *See Coleman,* 501 U.S. at 750.

B. Procedurally Defaulted Destruction of Evidence Claim

In cases where a district court denies a habeas claim on procedural grounds without reaching the merits of the underlying constitutional claim, a certificate of appealability should issue if the petitioner shows that (1) jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and (2) jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack,* 529 U.S. at 485.

Here, the dispositive question before the Court is whether jurists of reason would conclude that its dismissal of Abramov's destruction of evidence claim based on procedural grounds was

debatable. "A habeas petitioner who has exhausted his state court remedies without properly asserting his federal claim at each level of state court review has procedurally defaulted that claim." *Lewis*, 390 F.3d at 1026. To properly assert a federal claim to the state courts, Abramov was required to "fully and fairly presented his claims to the state appellate courts, thus giving the state courts a meaningful opportunity to consider the substance of the claims that he later presents in his federal challenge." *Bintz*, 403 F.3d at 863.

In his petition for leave to appeal the Illinois Supreme Court, Abramov's argument was based solely on the alleged discovery violations for the loss or destruction of the tapes. At no point in his argument did he claim that the State or the trial court violated his right to a fair trial, to confront witnesses, or due process. In fact, there is not even a hint that his claim was anything other than a claim based on discovery violations. In light of the fact that there was no indication that Abramov was making constitutional claims in his petition for leave to appeal, this is not a matter that would be subject to debate among reasonable jurists. The Court thus denies Abramov's request for a certificate of appealability as to his destruction of evidence claim.

II. Confrontation Clause

Next, Abramov asserted in his habeas petition that the Illinois Appellate Court's decision concerning his Confrontation Clause claim was an unreasonable application of clearly established Supreme Court law because the Illinois court concluded that the attorney-client privilege trumped his constitutional right to confront his accusers. Specifically, the Illinois Appellate Court stated:

> [T]he right to confront one's accusers does not take precedence over the attorney-client privilege. Like the right to confrontation, the attorney-client

> privilege is designed "to promote the judicial process itself." Thus, unlike some privileges deemed to be of secondary importance, the attorney-client privilege does not give way to a defendant's right under the confrontation clause.

People v. Abramov, No. 2-99-0424, at *18 (2d Dist. Apr. 24, 2001) (unpublished order) (internal citations omitted). Abramov, however, also admitted that the "United States Supreme Court has not yet addressed the precise issue raised here – a clash between a criminal defendant's Constitutional rights and an assertion of the attorney-client privilege." (R. 2-1, Memo. in Support of Section 2254 Petition, at 39.)

Indeed, the Court did not find any Supreme Court case law directly on point with Abramov's claim. Accordingly, the Court concluded that Abramov's reliance on Seventh and Ninth Circuit decisions could not be the basis for a finding that the Illinois Appellate Court's decision involved an unreasonable application of clearly established federal law as determined by the Supreme Court. *See Sweeney v. Carter,* 361 F.3d 327, 333-34 (7th Cir. 2004); *Young v. Walls,* 311 F.3d 846, 849 (7th Cir. 2002).

In his COA application, Abramov argues that clearly established Supreme Court precedent recognizes "that persons charged with crimes have a Constitutional right to present a defense, a right that evidentiary rules – including evidentiary privileges – cannot stymie." (R. 35-1, Memo. in Support of Request for COA, at 4.) Abramov then cites to the following Supreme Court authority. *See Green v. Georgia,* 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973); *see also Holmes v. South Carolina,* ____ U.S. ____, 126 S.Ct. 1727, ___ L.Ed.2d ___ (2006). Although these cases discuss the contours of the Confrontation Clause in the context of evidentiary rules, they do not specifically address the right to confront one's accusers and the attorney-client privilege.

Because there is no Supreme Court authority supporting his claim, it cannot be debatable among reasonable jurists that the Illinois Appellate Court's decision was an unreasonable application of clearly established Supreme Court law. The Court denies Abramov's request for a COA as to this claim.

III. Sufficiency of the Evidence

Last, Abramov contends that he has met the statutory standard for the issuance of a COA on the issue of whether the evidence presented at trial was legally sufficient to support his convictions under *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). To recap, although Abramov admits that the State's four chief witnesses – Solti, Jones, Weaver, and Bell – all testified that Abramov personally solicited them to kill his wife, Abramov argues that the evidence at trial was legally insufficient because these witnesses were impeached, biased, and their testimony was inconsistent. In short, the essence of Abramov's argument in his habeas petition was that the trial judge made impermissible inferences based on the evidence presented at trial. In his application for a COA, Abramov argues that he was not taking umbrage with the fact that the trial court made inferences, instead, he argues that these inferences were not supported by the trial evidence.

In analyzing Abramov's argument that the evidence was legally insufficient because Solti, Jones, Bell, and Weaver were impeached and their testimony was biased and inconsistent, the Illinois Appellate Court not only deferred to the trial court's credibility determinations, but explained the detailed evidence presented at trial that Abramov asked Jones and Solti to kill his wife and that Abramov had previously asked Bell and Weaver to do the same. *See People v. Abramov,* No. 2-99-0424, at *7-10. The Illinois Appellate Court noted the inconsistencies in the witnesses' testimony, but also highlighted the substantial evidence which corroborated the testimony of these witnesses. The Illinois Appellate Court for example analyzed the evidence

showing that Weaver, Bell, Solti, and Jones were aware of various details of defendant's life "which would have been difficult, if not impossible, for them to learn from any source other than defendant." *People v. Abramov,* No. 2-99-0424, at *7. Based on the Illinois Appellate Court's detailed and thorough analysis, the Court concluded that the Illinois court's decision did not lie "well outside the boundaries of permissible differences of opinion." *Woods v. McBride,* 430 F.3d 813, 816-17 (7th Cir. 2005) (quoting *Hardaway v. Young,* 302 F.3d 757, 762 (7th Cir. 2002)).

Abramov's argument that there was no factual basis for his conviction simply cannot be reconciled with the four key witnesses' testimony that Abramov solicited them to murder his wife, Angela, and the fact that this testimony was corroborated by other evidence, including Angela's own testimony. Under the *Jackson v. Virginia* standard, this issue does not provide for debate among reasonable jurists, and thus should not proceed further. *See id.* at 319 ("whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."). Therefore, the Court denies Abramov's request for a COA as to this claim.

CONCLUSION

For these reasons, the Court denies Abramov's application for a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2) and Federal Rule of Appellate Procedure 22(b).

Dated: June 29, 2006

ENTERED

/s/
AMY J. ST. EVE
United States District Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 13, 2006
Decided October 27, 2006

Before

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 06-2825

YECHIEL ABRAMOV, *Petitioner-Appellant,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
v.	
NEDRA CHANDLER, *Respondent-Appellee.*	NO. 05 C 4795 Amy J. St. Eve, *Judge.*

ORDER

Yechiel Abramov has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.